CONSTRUCTIVE TRUSTS ARISING FROM BREACH OF EXPRESS ORAL TRUSTS OF LAND

A recent Washington case raises the troublesome question of the rights of proposed beneficiaries under an oral trust of land. A husband by will left real estate to his wife. At the time of the execution of the will it was orally agreed that the wife, if she survived the husband, should have the use of the property for her life, holding it intact until her death, at which time it should be divided equally among their children. The wife conveyed the property to one of the children. It was held that the other child had no enforceable interest in the property. *Brown v. Kausche* (1917, Wash.) 167 Pac. 1075.

In reaching this decision the court professed to follow the settled law of Washington, relying upon prior cases in which it had been held that there was no enforceable trust where land was conveyed by absolute deed but upon an oral agreement by the grantee to reconvey to the grantor. In order to determine whether the decisions relied upon by the Washington court were really in point, it is necessary to distinguish more carefully than the court did between different types of cases. They may be grouped under three general heads: (1) transfers *inter vivos* on oral trusts for the grantor; (2) transfers *inter vivos* on oral trusts for others than the grantor; (3) gifts by will.

In the first of these groups the authorities in the United States, with hardly a dissenting voice, refuse to recognize that the grantor has an enforceable interest in the property.[1] On the other hand, the modern English rule recognizes a "constructive" trust, based upon the principle that one who refuses to perform an express oral agreement must restore either what he received or its value.[2] In some cases the result is, of course, to require the grantee to do exactly what he orally agreed to do. This coincidence need not blind us to the real basis for the decision, any more than when the action is brought at law on a quasi-contract where an express oral contract within the statute of frauds has been broken by the defendant after performance by the plaintiff.[3] It seems clear that the American courts are

[1] *Titcomb v. Morrill* (1865, Mass.) 10 Allen, 15. For numerous cases in accord, see the note in 39 L. R. A. (N. S.) 906. In at least one jurisdiction the grantor is permitted to recover the value of the land at law. *Cromwell v. Norton* (1906) 193 Mass. 291.

[2] *Davies v. Otty* (1865) 35 Beav. 208; *Haigh v. Kaye* (1872) L. R. 7 Ch. App. 469; *In re Duke of Marlborough* [1894] 2 Ch. 133. There is a tendency in a few American jurisdictions to adopt the English rule. See *Taylor v. Morris* (1912) 163 Cal. 717, 127 Pac. 66; *Bowler v. Curler* (1891) 21 Nev. 158, 26 Pac. 226; and other cases cited in 12 MICH. L. REV. 527, note 64. In many cases, however, the court relies on a "special confidential relation."

[3] For citation of authorities, see Woodward, *The Law of Quasi-Contracts*, Chap. VI.

guilty of failing to recognize what is after all a very simple application of ordinary equitable principles, obviously being misled by the coincidence referred to. The almost universally recognized rule that an absolute deed may be shown by extrinsic evidence to have been given to secure the payment of money seems to be based upon a more or less unconscious recognition of the same equitable principle.[4]

In the second and third groups of cases, however, a different problem is presented, since the trust is for persons other than the grantor or testator. Granting that the express oral trust is unenforceable, does the principle applied in the first group of cases enable us to impose a "constructive" trust obligation upon the grantee or devisee in favor of the proposed beneficiary? So far as the authorities go, this question is usually answered in the negative for the second group[5] and in the affirmative for the third.[6] If all that we have is a failure to keep an express oral agreement to hold in trust for third persons, it seems difficult to find any basis for raising a "constructive" trust on behalf of the proposed beneficiaries on the theory that the grantee or devisee otherwise will be unjustly enriched *at their expense,* unless we at least tacitly assume that these beneficiaries have been deprived of something to which they were in some way or other entitled—which is, of course, to assume just what we are trying to establish. Nevertheless, as stated, in the third group of cases the authorities (outside of Washington) are very nearly unanimous in imposing a so-called "constructive" trust on behalf of the intended beneficiary. A typical argument is that of Cardozo, J., in a recent decision in New York.

"The principle is now a settled one in this state that where a devise is induced by the promise, express or implied, of the devisee, to devote the gift to a lawful purpose, a secret trust is created; and equity will compel him to apply the property in accordance with the promise by force of which he procured it. . . . A court of equity in such cases exerts its power, not merely because there has been a breach of contract, but because the promise has been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would result in an unjust

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[4] The opinions of the courts are not as a rule very clear as to the real basis for this doctrine, and many apparently believe it to be purely anomalous. Typical cases are: *Linkemann v. Knepper* (1907) 226 Ill. 473, 80 N. E. 1009; *Campbell v. Dearborn* (1872) 109 Mass. 130.

[5] *Lantry v. Lantry* (1869) 51 Ill. 458. Some authorities are contra, *e. g., Fox v. Fox* (1906) 77 Neb. 601, 110 N. W. 304. For other authorities in accord and contra, see the note in 39 L. R. A. (N. S.) 906; also 12 MICH. L. REV. 442, notes 27 and 28. In *Ahrens v. Jones* (1902) 169 N. Y. 555, 62 N. E. 666, the grantor executed the conveyance while on his death bed and the court enforced the oral trust, apparently assimilating the case to those in group three.

[6] *Riordan v. Bannon* (1871) Ir. Rep. 10 Eq. 469; *Curdy v. Berton* (1889) 79 Cal. 420, 21 Pac. 858. For other authorities in accord see the note in 39 L. R. A. (N. S.) 906.

enrichment and would constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion."[7]

Undoubtedly decisions of this kind appeal to our sympathy, for the only alternative is to impose a constructive trust for the heir of the testator, who in many cases turns out to be identical with the devisee, and who, in any event, is not likely to carry out the testator's wishes. It is, however, difficult to reconcile them with the plain language of the statutes, and it is equally hard to see why, if we are to be consistent, the same result must not be reached where the land is transferred by deed instead of by will.[8]

It has indeed been suggested that in the second and third groups a distinction should be drawn between the mere breach of an oral agreement made in good faith and the obtaining of the gift by means of a promise made in bad faith, *i. e.*, one made with no intention to perform and for the purpose of obtaining the property. This distinction has, to some extent, been followed in the American authorities dealing with transfers *inter vivos* on oral trusts for third persons,[9] but not where the gift is by will. If the statutes of frauds and wills are to be enforced in letter and in spirit, even in the case of bad faith referred to, it seems questionable whether anything more than damages for a tort should be given to the proposed beneficiary. That in a suitable case a tort liability in damages should be recognized for diverting from the plaintiff property which would otherwise have come to him by inheritance or devise, seems clear. See (1917) 27 YALE LAW JOURNAL, 263. To create for the proposed beneficiary an equitable interest in the property, however, under pretence of giving specific reparation for a tort, seems in essence to be nothing more than the enforcement of the oral trust which is forbidden by the statutes. For this reason the decision of the Washington court in the principal case, opposed as it is to the general current of the authorities, seems to be based on sound principles. It is to be hoped, however, that the Washington court, and the American courts in

[7] *Golland v. Golland* (1914, Sup. Ct.) 84 Misc. Rep. 299; 147 N. Y. Supp. 263, 267.

[8] Professor George P. Costigan, Jr., in his exhaustive treatment of the whole subject in 28 HARV. L. REV. 237, 28 *ibid.* 366, argues (p. 266) that the courts should recognize a constructive trust in both cases. See also the same author's discussion in 12 MICH. L. REV. 427, 12 *ibid.* 514.

[9] *Crossman v. Keister* (1906) 221 Ill. 69, 79 N. E. 58. This distinction was approved by the late Professor James Barr Ames. See his essay upon Constructive Trusts Based upon the Breach of an Express Oral Trust of Land, in his *Lectures on Legal History*, 425, 430. The same result is reached where the conveyance is solicited, or where there is a violation of some "special confidential relationship." The authorities are collected by Professor Costigan in 12 MICH. L. REV. 442, and note 29.

general, will ultimately come to recognize and enforce a constructive trust on behalf of a grantor who has conveyed on an oral trust for himself.

IMMUNITIES OF DIPLOMATIC OFFICERS

A recent English case, *Re Suarez* (1917, Ch. D.) 117 L. T. 239, again emphasizes the privileged position with respect to judicial process held by diplomatic officers of foreign governments accredited to England. In that case the Bolivian Minister to Great Britain acted unofficially as administrator of the estate of a fellow-national. There being a balance due on his account as such administrator, the plaintiff, as beneficiary of the estate, sought to have a writ of sequestration issued against property of the defendant which was not necessary to maintain his personal comfort or dignity as Minister. Although the Minister had waived his diplomatic immunity from suit, the Court held that no writ of execution could issue against any of his property, in view of the Diplomatic Privileges Act[1] which declared null and void all writs and processes sued out against the person or property of public Ministers.

The immunities of diplomatic officers are extended to them in their official character of state agents and are enjoyed by them as representatives of their sovereigns. The immunity from civil process belongs technically to the Minister's State and does not vest in him personally, and it has been held that, in principle, a diplomatic officer is incompetent to waive it.[2] The immunities mentioned extend to his family and to the members of his official household.[3] Nor do these expire, according to the better opinion, with the cessation of his functions; but they are retained for a reasonable time after he has presented his letters of recall.[4] It seems also that an ambassador is immune from arrest on civil process while traveling through a third state to which he is not accredited.[5] Some of the customary diplomatic immunities, particularly the immunity from judicial process, have in many countries found legislative expression in municipal statutes.[6]

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[1] Act of 1708 (7 Anne c. 12).

[2] *United States v. Benner* (1830, U. S. C. C. Pa.) 1 Baldwin 234.

[3] *Lockwood v. Coysgarne* (1765, K. B.) 3 Burr. 1676; *Respublica v. DeLongchamps* (1784, Pa. O. & T.) 1 Dall. 111.

[4] *D'Azambuja v. Pereira* (1830, U. S. D. C. Pa.) 1 Miles 366; *Contra, Marshall v. Critico* (1808, K. B.) 9 East 447.

[5] *Holbrook v. Henderson* (1851, N. Y. Super.) 4 Sandf. 619; *Wilson v. Blanco* (1889) 56 N. Y. Super. 582 and criticism of this case in 1 Westlake, *Int. Law*, 265-266.

[6] In the United States, secs. 4063-4064 of the Revised Statutes. In Great Britain, the Act of 1708 (7 Anne c. 12) applied in the principal case. See also, for foreign legislation, Odier, *Des privileges des agents diplomatiques*, 53-78.